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ANDALEX RESOURCES, INC., AMCA COAL LEASING, INC., MALAPAI RESOURCES COMPANY, PACIFIC DIVERSIFIED CAPITAL COMPANY, NEW ALBION RESOURCES COMPANY, and MONO POWER COMPANY, Plaintiffs and Appellees, vs. RICHARD B. MYERS, MYERS, INC., MYERS & COMPANY, BETTY SUE MYERS, CECELIA MYERS BAUGH, JANE MYERS BAGGETT, and CAROLYN W. HUNT, Defendants and Appellants : Brief of Appellee

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Utah Court of Appeals

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DOCKET NO. 920876

IN THE UTAH COURT OF APPEALS

ANDALEX RESOURCES, INC., AMCA COAL LEASING, INC., MALAPAI RESOURCES COMPANY, PACIFIC DIVERSIFIED CAPITAL COMPANY, NEW ALBION RESOURCES COMPANY, and MONO POWER COMPANY, Plaintiffs-Appellees, vs. RICHARD B. MYERS, MYERS, INC., MYERS & COMPANY, BETTY SUE MYERS, CECELIA MYERS BAUGH, JANE MYERS BAGGETT, and CAROLYN W. HUNT, Defendants-Appellants.	)	Case No. 920876-CA Priority No. 15

On Appeal from the Judgment of
the Third Judicial District Court
for Salt Lake County, State of Utah
Honorable J. Dennis Frederick

BRIEF OF APPELLEES

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IN THE UTAH COURT OF APPEALS

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Plaintiffs-Appellees,	)	
vs.	)	Case No. 920876-CA
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JURISDICTION

This is an appeal from a final judgment of the Third Judicial District Court. This Court has jurisdiction over this appeal pursuant to section 78-2-2(3)(j), Utah Code Ann. (1992), and pursuant to the Supreme Court's transfer of the appeal pursuant to Rule 42(a) of the Utah Rules of Appellate Procedure.

ISSUES PRESENTED FOR REVIEW

1. Did the trial court abuse its discretion in denying Myers' motion for leave to file amended counterclaim?

2. Did the trial court properly dismiss Myers' contract and quasi-contract claims on grounds that the claims were barred by the real estate licensing laws and the Statute of Frauds?

3. Did the trial court properly dismiss Myers' fraud claim on grounds that Myers presented insufficient evidence to satisfy his clear and convincing burden of proof?

4. Did the trial court properly dismiss Myers' contract claims against MPM on grounds that the broker licensing statutes bar the claims and that MPM did not have an obligation, express or implied, to assure that Andalex compensated Myers?

STANDARDS OF REVIEW

1. The Court reviews the district court's order denying Myers leave to amend his counterclaim (issue 1 above) under an abuse of discretion standard. "[T]he granting of leave to amend is a matter which lies within the broad discretion of the court, and its rulings are not to be disturbed in the

absence of a showing of an abuse of discretion resulting in prejudice to the complaining party." Girard v. Appleby, 660 P. 2d 245, 248 (Utah 1983). See also Westley v. Farmer's Ins. Exch., 663 P. 2d 93, 94 (Utah 1983); Chadwick v. Nielsen, 763 P. 2d 817, 820 (Utah Ct. App. 1988).

2. In reviewing an order granting summary judgment (issues 2, 3 and 4 above), the Court "view[s] the facts and inferences in the light most favorable to the losing party," and reviews the district court's legal conclusions for correctness. Pratt ex. rel. Pratt v. Mitchell Hollow Irrigation Co., 813 P. 2d 1169, 1171 (Utah 1991). The Court will affirm summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Frisbee v. K&K Constr. Co., 676 P. 2d 387, 389 (Utah 1984).

STATUTORY PROVISIONS

Interpretation of the following statutory provisions may be determinative of some of the issues raised by this appeal:

25-5-4. **Certain agreements void unless written and subscribed.**

> In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:
>
> (5) Every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation.

Utah Code Ann. § 25-5-4 (1989).

78-12-25. Within four years.

Within four years:
(1) An action upon a contract, obligation, or liability not founded upon an instrument in writing; also on an open account for goods, wares, and merchandise, and for any article charged on a store account; also on an open account for work, labor or services rendered, or materials furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received.

Utah Code Ann. § 78-12-25 (1992).

61-2-2. Definitions.

As used in this chapter:
(7) "Principal real estate broker" and "principal broker" means:

(a) any person who for another and for valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting valuable consideration, sells, exchanges, purchases, rents, or leases or negotiates the sale, exchange, purchase, rental, or leasing of, or offers or attempts or agrees to negotiate the sale, exchange, purchase, rental, or leasing of, or lists or offers or attempts or agrees to list, or auctions, or offers or attempts or agrees to collect rental for the use of real estate or who advertises, who buys or offers to buy, sells or offers to sell, or otherwise deals in options on real estate or the improvements thereon or who collects or offers or attempts or agrees to collect rental for the use of real estate or who advertises or holds himself, itself, or themselves out as engaged in the business of selling, exchanging, purchasing, renting, or leasing real estate, or assists or directs in the procuring of prospects or the negotiations or closing of any transaction which does or is calculated to result in the sale, exchange, leasing, or renting of any real estate;
. . .

(8) "Real estate" includes leaseholds and business opportunities involving real property.

Utah Code Ann. § 61-2-2(7)-(8) (1989).

61-2-18(1). Actions for recovery of compensation restricted.

(1) No person may bring or maintain an action in any court of this state for the recovery of a commission, fee, or compensation for any act done or service rendered which is prohibited under this chapter to other than licensed principal brokers, unless the person was duly licensed as a principal broker at the time of the doing of the act or rendering the service.

Utah Code Ann. § 61-2-18(1) (1989).

STATEMENT OF THE CASE

A. Nature of the Case

This action was commenced in July, 1986 by Andalex Resources, Inc. and AMCA Coal Leasing, Inc. (jointly "Andalex") to obtain a declaratory judgment that Richard B. Myers and Myers & Company (jointly "Myers") are not entitled to recover from Andalex any fee or other compensation for allegedly acting as a broker in connection with Andalex's purchase of certain coal leases situated within the State of Utah.[1] Andalex purchased the leases from Malapai Resources, Inc, ("Malapai"), New Albion Resources Company (now known as Pacific Diversified Capital Company) ("Pacific"), and Mono Power Company ("Mono"). In the Complaint, Andalex asserts that, among other things, any claim

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[1] This action was originally commenced by Andalex against Richard B. Myers and Myers, Inc. However, Myers & Company was substituted for Myers, Inc. by order of the district court. (Record ("R.") 175.)

of Myers to recover any compensation is barred by the Statute of Frauds, Utah Code Ann. § 25-5-4 (1989), and by the real estate broker licensing statutes, Utah Code Ann. § 61-2-18(1)(1989). Myers counterclaimed against Andalex seeking recovery of compensation for his services for acting as a "finder" in connection with Andalex's purchase of the coal leases, asserting theories of breach of contract, quantum meruit, fraud and negligent misrepresentation.

Myers also filed a counterclaim against Malapai, Pacific and Mono.[2] In his counterclaim, Myers alleges that Malapai, Pacific and Mono entered into a contract which provided that Myers would act on behalf of Malapai, Pacific and Mono to find a sublessee, assignee or purchaser of the coal leases. Under the express terms of the contract, Malapai, Pacific and Mono had no obligation to compensate Myers for these services. Myers contends, however, that the contract contained an implied obligation that Malapai, Pacific and Mono would assure that any sublessee, assignee or purchaser of the coal lease would compensate Myers. Myers alleges that Malapai, Pacific and Mono breached the contract by failing to assure that Andalex would compensate Myers. Myers also alleges that Malapai, Pacific and

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[2] Myers originally filed a third-party complaint against Malapai, Pacific and Mono. By order of the district court, Malapai, Pacific and Mono were made plaintiffs in this action, and Myers' third-party complaint was deemed a counterclaim. (R. 175.)

Mono intentionally interfered with Myers' prospective economic relationship with Andalex.

B. The Course of the Proceedings

On February 22, 1991, the district court entered an order granting Andalex partial summary judgment, declaring that the Statute of Frauds and the broker licensing statutes precluded any contract or quasi-contract claims for compensation by Myers. The court also dismissed Myers' counterclaim against Andalex for breach of contract and quasi-contract. (R. 370-72.)

On October 11, 1991, the district court denied Myers' motion for leave to file an amended counterclaim. (R. 476-77.) The proposed amended counterclaim contained a new claim against Andalex based upon a theory that Andalex had agreed to enter in a partnership with Myers regarding the coal leases. (R. 380-86.)

On May 27, 1992, the district court entered a Summary Judgment and Order dismissing the remaining fraud and negligent misrepresentation claims against Andalex. (R. 882-84.) On the same date, the district court also entered a Summary Judgment and Order dismissing all claims against Malapai, Pacific and Mono. (R. 885-87.)

STATEMENT OF FACTS

1. Malapai, Pacific and Mono (hereinafter jointly "MPM") were the joint owners of certain coal leases ("Leases") granted by the United States and the State of Utah. The Leases concern approximately 47,000 acres of real property situated in Kane County, Utah. (R. 130.)

2. Myers entered into a letter agreement dated May 23, 1979 with MPM, (Addendum, Ex. A), which provided, among other things, that Myers would act as a "finder" for MPM in locating a coal mining company to produce coal from the Leases or find a sublessee, assignee or purchaser of the Leases. (R. 131.) Myers testified that he was to act as a "finder" on behalf of MPM.[3] (R. 539-40.)

3. The agreement between Myers and MPM was further evidenced by a letter dated May 5, 1980, (Addendum, Ex. B), a letter dated March 18, 1981, (Addendum, Ex. C), and a letter dated March 24, 1981, (Addendum, Ex. D). (R. 582-85, 542-44.) Myers testified that these letters accurately reflected his

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[3] Myers contends that James Wilson, acting as an employee of Pacific and as an agent for Malapai and Mono, approached Myers in Kentucky seeking to employ Myers. (Brief of Appellants at 7, ¶ 8.) To support this contention, Myers cites to his counterclaim filed in this action. (R. 139.) A citation to one's own pleading to support a factual contention in opposition to a motion for summary judgment is inappropriate and the contention should be disregarded. Hall v. Fitzgerald, 671 P.2d 224, 226-27 (Utah 1983); Thornock v. Cook, 604 P.2d 934, 936 (Utah 1979); United Am. Life Ins. Co. v. Willey, 21 Utah 2d 279, 444 P.2d 755, 758-59 (1968).

understanding of the compensation arrangement between the parties. (R. 547-52.)

4. Under the arrangement between Myers and MPM, Myers was to be compensated by the sublessee, assignee or purchaser of the Leases, and not by MPM. (R. 540, 545-46, 551-52.)

5. Eventually, Myers located W. R. Grace & Co. ("Grace") and introduced Grace to MPM. (R. 131, 582-85.) After some negotiations, on or about July 23, 1981, Grace and Myers entered into option agreements (the "Options") with Malapai and Pacific, whereby Malapai and Pacific granted to Grace and Myers an option for the acquisition of their interests in the Leases.[4] (R. 553-55, 578, 582-85, 609.)

6. On or about July 12, 1981 Grace and Myers entered into an agreement to compensate Myers, under certain terms and conditions, for "his efforts in bringing the parties together." (R. 131, 556-58.) Under this agreement, Myers would only receive compensation if Grace exercised the Options. (R. 654-60, 788-815.)

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[4] In Myers' Brief he claims that the Options were entered into with Pacific and Mono. (Brief of Appellants at 8, ¶ 11.) However, the portion of the Record that Myers cites, (R. 213), states that the Options were in fact entered into with Malapai and Pacific, and not Mono. Myers' testimony supports the fact that Mono did not execute an option. (R. 553-55.)

7. Because of the expense, Grace was unwilling to exercise the Options and proceed with the acquisition of the Leases without a financial partner willing to share the risk. Additionally, Grace was unwilling to exercise the Options without a market for the coal. (R. 661-70, 702-03, 708-10, 715-20.)

8. Grace allowed the Options to expire in August 1982. However, Myers contends that he had an informal arrangement with Malapai and Pacific that, notwithstanding the expiration of the Options, they would transfer their interest in the Leases to Grace if it elected to proceed. (R. 669-70, 702-03, 708-10.) According to Myers, for this reason, he continued to look for a company which was capable and willing to enter a joint venture with Grace. (R. 702-04.)

9. Myers eventually contacted Andalex in approximately September 1982, and arranged for negotiations between Grace and Andalex regarding a joint venture for the development of the Leases. (R. 131, 610, 582-85, 702-07, 712-714.)

10. Discussions between Grace and Andalex continued into 1984. (R. 613-17.) Eventually, Grace determined not to go forward with the purchase and development of the Leases. (R. 131-32, 582-85, 613-17, 651-52.)

11. Andalex, however, was still interested in purchasing the Leases and commenced negotiations directly with MPM. According to Myers, he arranged and attended some of the meetings between those parties. (R. 132, 582-85, 722-25.)

12. The agreement between Myers and MPM did not prohibit MPM from negotiating directly with potential sublessees, assignees or purchasers. (R. 561-63, 597.)

13. At a meeting on March 28, 1985 between MPM and Andalex, in the presence of Myers and his attorney, Andalex made clear its understanding and intention that it had no agreement to compensate Myers. Myers made no claim to the contrary at the meeting. (R. 672-76, 727-33, 783-87, 816-18.)

14. On or about September 10, 1985, Andalex entered into an agreement with MPM to purchase the Leases. (R. 132, 582-85.)

15. Myers alleges that Andalex agreed to compensate Myers by assuming the position of Grace under the July 12, 1981 agreement between Grace and Myers. (R. 133, 383.) There is no written document or memorandum signed by Andalex evidencing this purported agreement between Andalex and Myers. (R. 586-87.)

16. Myers believes that Robert Anderson, the President of Andalex and the only officer of Andalex with whom Myers had any dealings concerning compensation, was honest in

his dealing with Myers and was not attempting to deceive Myers. (R. 876-78.) Myers specifically testified as follows:

> Q. Do you know of any other facts that lead you to believe that Mr. Anderson intended to deceive or mislead you concerning compensation to you regarding the work you performed in connection with the Kaiparowits leases?
>
> A. I think the only thing that they did that was deceiving to us was to go around Grace prior to telling us that they were going to do it. I don't think Mr. Anderson was attempting to deceive us. He was just like he always was, straight upfront.

(R. 877-78.)

17. Myers has no knowledge of any facts that support the claim that Andalex was not acting in good faith in negotiating with Grace. Myers testified as follows:

> Q. Do you know of any facts that lead you to believe that Mr. Anderson or anyone from Andalex did not enter into discussions with Grace in good faith?
>
> A. I don't know what their thinking was; therefore, my answer is no.

(R. 878.)

18. Each officer of Andalex involved with the purchase of the Leases has testified that nothing that MPM did or did not do caused Andalex to refuse to enter into a contract with Myers or to compensate Myers. (R. 529, 569-71, 675-76.)

19. Myers has no knowledge of any instance where MPM in anyway interfered with Andalex compensating Myers. (R. 564-65.)

20. Myers has no knowledge of any intentional act of MPM made to cause harm to Myers. (R. 565.)

21. Myers holds no license in Utah or Kentucky to act as a real estate broker. (R. 275-76, 595.)

SUMMARY OF ARGUMENT

Myers argues that the trial court abused its discretion in denying his motion for leave to file an amended counterclaim, even though the motion was made almost five years after the case was initiated. As will be shown below, the district court properly denied this motion because the proposed new claim was legally insufficient -- it was barred by the statute of limitations, the real estate broker licensing laws, and the Statute of Frauds. Moreover, the claim was properly denied because Myers was unduly dilatory in seeking leave to amend the counterclaim.

Myers also contends that the trial court improperly dismissed his contract and quasi-contract claims against Andalex. Myers suggests that although the real estate licensing laws on their face clearly bar his claim, they should not apply because Myers' conduct does not fall within the "purpose" of the licensing requirements. This Court has previously expressly

rejected this type of argument and should do so again here. In addition, the court properly found that these claims were barred by the Statute of Frauds.

Myers suggests that the trial court should not have dismissed his fraud claim against Andalex, even though Myers' own testimony established that Andalex did not have the requisite intent to deceive. We will show, among other things, that because Myers was unable to satisfy his burden of "clear and convincing" proof on this essential element, summary judgment was properly granted.

Finally, Myers argues that his contract claims against MPM should not have been dismissed. As will be shown below, however, the trial court properly concluded that the broker licensing statutes barred this claim and that MPM had no obligation, express or implied, to assure that Andalex compensated Myers.

As set forth more fully below, the judgment of the trial court should be affirmed.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED DEFENDANTS' MOTION FOR LEAVE TO FILE AN AMENDED COUNTERCLAIM

On May 23, 1991, almost five years after the case was initiated, Myers filed a motion for leave to file an amended counterclaim against Andalex. In the proposed amended counterclaim, Myers asserted a new cause of action against

Andalex based upon an alleged agreement that Andalex would enter into a partnership or joint venture with Myers. (R. 380-83.) The original counterclaim sought recovery of compensation allegedly owing to Myers for acting as a "finder" in connection with Andalex's purchase of the Leases. (R. 380-83.)

The motion for leave to file an amended counterclaim was properly denied by the district court on any of a number of grounds before the district court including (1) the new partnership claim was barred by the statute of limitations, Utah Code Ann. § 78-12-25 (1992); (2) the claim was barred by the real estate broker licensing laws, Utah Code Ann. § 61-2-18(1)(1989); (3) the claim was barred by the Statute of Frauds, Utah Code Ann. § 25-5-4 (1989); and (4) Myers had been unduly dilatory in seeking leave to amend the counterclaim.[5]

A. Standard of Review

The Court reviews the district court's order denying Myers leave to amend his counterclaim under an abuse of

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[5] An appellate court will sustain a lower court decision on any proper grounds. Jesperson v. Jesperson, 610 P. 2d 326, 328 (Utah 1980); Bagshaw v. Bagshaw, 788 P. 2d 1057, 1060 (Utah Ct. App. 1990); Arizona Bd. of Regents v. States ex. rel. State of Ariz. Pub. Safety Retirement Fund Manager Adm'r, 771 P. 2d 880, 884 (Ariz. Ct. App. 1989); LaMon v. Butler, 770 P. 2d 1027, 1031 (Wash.), cert. denied, 493 U. S. 814 (1989). Accordingly, if any one of the various grounds for denying the motion is found by this Court to be meritorious, or not an abuse of discretion by the district court, as applicable, then the order denying the motion for leave should be sustained.

discretion standard. "[T]he granting of leave to amend is a matter which lies within the broad discretion of the court, and its rulings are not to be disturbed in the absence of a showing of an abuse of discretion resulting in prejudice to the complaining party." Girard v. Appleby, 660 P.2d 245, 248 (Utah 1983). See also Westley v. Farmer's Ins. Exch., 663 P.2d 93, 94 (Utah 1983); Chadwick v. Nielsen, 763 P.2d 817, 820 (Utah Ct. App. 1988).

B. The Proposed Partnership Claim is Barred by the Applicable Statute of Limitations

It is fundamental that leave to file an amended pleading should be denied when the moving party seeks leave to assert a new claim that is frivolous or legally insufficient. E.g., Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank, N.A., 804 P.2d 900, 904 (Idaho 1991); Conrad v. Imatani, 724 P.2d 89, 94 (Colo. Ct. App. 1986). Thus, a motion for leave to file an amended complaint should be denied when a new claim is asserted that is barred by a statute of limitations. Oliner v. McBride's Indus., Inc., 106 F.R.D. 9, 12 (S.D.N.Y. 1985); Cooper v. Thomas, 456 So. 2d 280, 283 (Ala. 1984).

In this instance, Myers' new claim of breach of an oral contract to enter into a partnership agreement is barred by the limitation contained in section 78-12-25 of the Utah Code which provides that an action on an oral contract must be commenced within four years. Utah Code Ann. § 78-12-25(1)

(1992); Last Chance Ranch Co. v. Erickson, 82 Utah 475, 25 P.2d 952, 958 (1933). The alleged breach by Andalex occurred by no later than September 1985, when Andalex acquired the Leases. The limitation period began to run at that time. Last Chance Ranch, 25 P.2d at 958; Butcher v. Gilroy, 744 P.2d 311, 313 (Utah Ct. App. 1987). To avoid the bar, Myers' new claim had to be filed no later than September 1989. It was not. The motion for leave to file the amended counterclaim was not filed until May 23, 1991, approximately 18 months beyond the statutory period.

Myers can only avoid the application of the statute of limitations if his new claim relates back to the date of filing the original counterclaim, as provided in Rule 15(c) of the Utah Rules of Civil Procedure.[6] For a new claim to relate back under Rule 15(c), it must arise out of the same conduct, transaction or occurrence set forth in the original pleading. Norman v. Nichiro Gyogyo Kaisha, Ltd., 645 P.2d 191, 198 (Alaska 1982) (amendment relates back if based on "same specific

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[6] Rule 15(c) provides:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

Utah R. Civ. P. 15 (c).

conduct"), overruled in part on other grounds, Hikita v. Nichico Gyogyo Kaisha, Ltd., 713 P.2d 1197 (Alaska 1986); Meyer v. Ford Indus., Inc., 622 P.2d 1139, 1141 (Or. Ct. App. 1981) (amendment relates back if based on the same conduct). An amendment which merely amplifies or clarifies a prior pleading will relate back. Oliner, 106 F.R.D. at 12; Cooper, 456 So. 2d at 283-84. Generally, a new cause of action asserted by way of amendment will relate back if the defending party should have known from the original pleading the new facts and new claim based on those facts alleged in the amended pleading. E.g., Percy v. San Francisco Gen. Hosp., 841 F.2d 975, 979 (9th Cir. 1988); cf. Ringwood v. Foreign Auto Works, Inc., 786 P.2d 1350, 1359-60 (Utah Ct. App.), cert. denied, 795 P.2d 1138 (Utah 1990); Augusta Bank & Trust v. Broomfield, 643 P.2d 100, 105 (Kan. 1982); 6A Charles A. Wright et al., Federal Practice and Procedure § 1497, at 85 (2d ed. 1990).

However, when an amended pleading asserts a new cause of action based on new or additional conduct, transactions or occurrences, the amendment does not relate back. Holmes v. Greyhound Lines, Inc., 757 F.2d 1563, 1566 (5th Cir. 1985). In Welch v. Continental Placement, Inc., 627 S.W.2d 319 (Mo. Ct. App. 1982), the court held: "If the amended pleading, however, requires proof of ultimate facts different from those necessary to sustain the original claim and thus adds a new cause of action, the amendment does not relate back so as to save the

action from the bar of limitations." 627 S.W.2d at 321. See also Dillard v. Vicksburg Medical Ctr., Inc., 695 F. Supp. 880, 883 (S.D. Miss. 1988).[7]

In this case, Myers originally sought to recover compensation for acting as a finder in connection with Andalex's acquisition of the Leases. By the amended counterclaim, Myers set forth a new cause of action based upon an alleged agreement that Andalex would enter into a partnership or joint venture with Myers. (Brief of Appellants at 12-13.) The two agreements are different and distinct, and therefore will require different elements of proof.[8] Moreover, there was no notice to Andalex

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[7] For other cases, see Graboi v. Kibel, 432 F. Supp. 572 (S.D.N.Y. 1977) (rape victim's claim of inadequate security did not relate back to claims against building owner based on vicarious liability for the intentional tort of the employee and breach of contract); Kimbrel v. Mercedes-Benz Credit Corp., 476 So. 2d 94, 96 (Ala. 1985) (claim of fraud in connection with a sale did not relate back to other claims concerning sale); Wing v. Martin, 688 P.2d 1172, 1175 (Idaho 1984) (claim of failure to warn and properly label a product did not relate back to claim of failure to prevent misuse of product).

[8] Counsel for Myers recognizes that the partnership claim would involve proof of facts different from those necessary to sustain the original claims against Andalex. Counsel stated to the district court when requesting leave to amend: "May we have leave to amend, Your Honor, to specifically get the Shire facts before the court?" (R. 932.) (The decision of Shire Develop. v. Frontier Invs., 799 P.2d 221 (Utah Ct. App. 1990) is the case relied upon by Myers to support his partnership claim against Andalex.)

of the partnership claim contained in the original counterclaim.[9]

The claim does not relate back to the original claim and is therefore barred by the statute of limitations. The district court properly denied Myers' motion for leave to file the amended counterclaim.

C. The Proposed Partnership Claim is Barred by the Statute of Frauds and the Broker Licensing Laws

Regardless of whether the partnership claim is a new and distinct claim or merely a reformulation of Myers' original claim, it is still a claim to compensate Myers for acting as a broker. The claim, therefore, is barred by the Statute of Frauds and the broker licensing statutes. The new cause of

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[9]Ringwood v. Foreign Auto Works, Inc., 786 P.2d 1350 (Utah Ct. App.), cert. denied, 795 P.2d 1138 (Utah 1990), relied upon heavily by Myers, is not controlling. In Ringwood, the Court, under an abuse of discretion standard, affirmed the district court's order permitting amendment of a plaintiff's pleading. The Court focused largely upon whether the defendants who opposed the amendment were aware of the basis for the amended claim prior to the expiration of the statute of limitations. The court noted that the amended claim conformed with a position argued by the defendants themselves, before the statute of limitations had run. Initially, the plaintiff had argued that certain agreements were controlling, while the defendants had argued that a different agreement was controlling. When the plaintiff sought to amend his complaint to base his claims on the agreement defendants argued controlled, the Court found no prejudice to the defendants. Id. at 1360. In the instant case, there was no claim of a partnership or partnership agreement prior to the expiration of the statute of limitations and motion for amended counterclaim, nor have Andalex or MPM ever made such a claim.

action is based upon a breach of an alleged agreement by Andalex to enter into a partnership with Myers. Myers contends that Andalex agreed to assume the position of Grace under the July 12, 1981 agreement between Grace and Myers. Presumably to avoid application of the Statute of Frauds and the broker licensing statutes, Myers does not claim that the agreement allegedly assumed by Andalex was to compensate Myers for acting as a finder. However, the agreement between Grace and Myers that Andalex allegedly assumed recites that it was to compensate Myers for "his efforts in bringing the parties together." (R. 131; see also 556-58.)[10]

Regardless of how the alleged agreement between Andalex and Myers is now characterized, it is still an agreement to compensate Myers for acting as a finder. Accordingly, to enforce the agreement, Myers must show that the agreement satisfies the provisions of Utah's Statute of Frauds and the broker licensing laws. Myers made no such showing.

Myers was not a licensed real estate broker. He is therefore precluded from maintaining an action for compensation for acting as a broker by reason of section 61-2-18(1) of the

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[10] Myers describes the agreement as an agreement to compensate Myers "for his efforts in introducing Grace to the opportunities presented by the coal leases." (Brief of Appellants at 12.) In both the original counterclaim and the proposed amended counterclaim, Myers describes the agreement as providing "for certain compensation for Mr. Myers as a result of his efforts in bringing the parties together." (Brief of Appellants at 15.)

Utah Code.[11] See infra part II.B. Furthermore, because there was no writing reflecting the alleged agreement between Andalex and Myers regarding compensation, Myers' claim for compensation is barred by the Statute of Frauds. Utah Code Ann. § 25-5-4 (1989).[12]

As noted above, a motion for leave to file an amended pleading should be denied if the amended pleading fails to state a claim. See supra p. 15. The proposed partnership claim asserted by Myers is without merit because it is barred by both the Statute of Frauds and the broker licensing laws. The

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[11] Section 61-2-18(1) provides:

> No person may bring or maintain an action in any court of this state for the recovery of a commission, fee, or compensation for any act done or service rendered which is prohibited under this chapter to other than licensed principal brokers....

Utah Code Ann. § 61-2-18(1) (1989).

[12] Section 25-5-4 provides:

> In the following cases every agreement shall be void unless such agreement ... is in writing subscribed by the party to be charged therewith: ... (5) Every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation.

Utah Code Ann. § 25-5-4 (1989). The current version of Section 25-5-4(5) remains substantially unchanged. See Utah Code Ann. § 25-5-4(5) (Supp. 1992).

district court properly denied Myers' motion for leave to assert this meritless claim.

D. Myers Was Unduly Dilatory in Seeking to File the Amended Counterclaim

A motion to amend should be denied if the party seeking the amendment has been unduly dilatory. Wood v. Santa Barbara Chamber of Commerce, Inc., 705 F.2d 1515, 1520 (9th Cir. 1983), cert. denied, 465 U.S. 1081 (1984); see also Lindey's, Inc. v. Professional Consultants, Inc., 797 P.2d 920, 923 (Mont. 1990) (quoting Forman v. Davis, 371 U.S. 178, 181 (1962)). When a considerable amount of time has elapsed since the commencement of the action, a party seeking leave to amend bears the burden of showing some adequate reason for the delay. See Tripp v. Vaughn, 746 P.2d 794, 797 (Utah Ct. App. 1987) (court did not abuse discretion in denying motion to amend where plaintiff was unable to state adequate reason for delay and opposing party claimed prejudice); see also Federal Ins. Co. v. Gates Learjet Corp., 823 F.2d 383, 387 (10th Cir. 1987) ("Courts have denied leave to amend in situations where the moving party cannot demonstrate excusable neglect. For example, courts have denied leave to amend where the moving party was aware of the facts on which the amendment was based for some time prior to the filing of the motion to amend."); Hayes v. New England Millwork

Distribs., Inc., 602 F.2d 15, 19-20 (1st Cir. 1979) (party must show valid reason for neglect and delay).[13]

In this case, Myers has no reasonable excuse for the delay. This action was commenced in July, 1986. The original counterclaim was filed on or about July 22, 1988. When Myers finally filed his motion for leave, it had been five years since this action was commenced and three years since the original counterclaim was filed. Myers' only explanation for his delay in seeking an amendment is that the legal basis for the claim was only recently settled in the Utah courts by the decision in Shire Development v. Frontier Investments, 799 P.2d 221 (Utah Ct. App. 1990). This explanation does not withstand scrutiny.

The Shire decision did not clarify or address a new or unique area of the law. In fact, the Shire court decided the issue relating to oral partnerships with reference to a 1974 Arizona case, Ellingson v. Sloan, 527 P.2d 1100 (Ariz. Ct. App.

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[13]Myers cites Regional Sales Agency, Inc. v. Reichert, 784 P.2d 1210 (Utah Ct. App. 1989), vacated, 830 P.2d 252 (Utah 1992). That opinion has been vacated and is not good law. Even if that decision were good law, the decision supports the district court's denial of leave to amend. The court in Regional Sales observed:

> Appellate courts have upheld a trial court's denial of a motion to amend where the amendment is sought late in the course of the litigation, where there is no adequate explanation for the delay, and where the movant was aware of the facts underlying the proposed amendment long before its filing.

Id. at 1216. Those very considerations are present in the instant case.

1974), which in turn relied on a 1925 decision, Eads v. Murphy, 232 P. 877 (Ariz. 1925). See 799 P.2d at 223. Contrary to Myers' assertion, the issue was not "unique," and did not justify the delay in seeking the amendment.[14] As noted in Hayes v. New England Millwork Distributors, Inc., 602 F.2d 15 (1st Cir. 1979), "ignorance or misunderstanding of the law 'has been held an insufficient basis for leave to amend.'" Id. at 20 (quoting Goss v. Revlon, Inc., 548 F.2d 405, 407 (2d Cir. 1976)). See also Evans v. Syracuse City School Dist., 704 F.2d 44, 47 (2d Cir. 1983).

Myers admits that he has known of the facts and circumstances that give rise to the partnership claim from the initiation of the litigation in 1986. (Brief of Appellants at 15; R. 377.) An unreasonable delay in seeking amendment after knowledge of the pertinent facts justifies denial of motion to amend. See Westley v. Farmer's Ins. Exch., 663 P.2d 93, 94 (Utah 1983) (finding no abuse of discretion in denying motion to amend where amendment would have delayed trial and substance of allegation was known a full year earlier); Gates Learjet Corp., 823 F.2d at 387; cf. Chadwick v. Nielsen, 763 P.2d 817, 820

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[14]Significantly, the Court in Shire cited the Arizona cases and the oral partnership issue in explaining its holding in Shire and not in support of its establishing "new" law in Utah. See 799 P.2d at 223-24.

(Utah Ct. App. 1988) (untimely motion denied where only excuse was failure to to conduct discovery).[15]

Myers was unreasonably dilatory in bringing the motion for leave to file the amended counterclaim. The district court did not abuse its discretion in denying Myers' untimely motion to amend.

II. THE DISTRICT COURT PROPERLY DISMISSED MYERS' CONTRACT AND QUASI-CONTRACT CLAIMS

A. Standard of Review[16]

In reviewing an order granting summary judgment, the Court "view[s] the facts and inferences in the light most favorable to the losing party," and reviews the district court's legal conclusions for correctness. Pratt ex rel. Pratt v. Mitchell Hollow Irrigation Co., 813 P.2d 1169, 1171 (Utah 1991). The Court will consider only the record properly before the district court. Id.

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[15] Myers argues that Andalex has not sustained any prejudice to justify denial of his motion. To the contrary. If the district court had allowed Myers to assert the new partnership claim, Andalex would have been required to redepose witnesses and propound additional written discovery. This type of prejudice justifies denial of the motion. E.g., Hayes, 602 F.2d at 20; cf. Evans v. Syracuse City School Dist., 704 F.2d 44, 46 (2d Cir. 1983) (delay for significant period of time in asserting affirmative defense almost invariably results in some prejudice) (quoting Advocat v. Nexus Indus., Inc., 497 F. Supp. 328, 331 (D. Del. 1980)).

[16] The Standard of Review set forth herein governs Points II, III and IV below.

The Court will affirm summary judgment if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. Frisbee v. K&K Constr. Co., 676 P.2d 387, 389 (Utah 1984). To defeat a summary judgment motion, the opposing party must demonstrate facts supporting each element of its claims. The "non-moving party's failure of proof concerning one essential element of that party's case necessarily renders all other facts immaterial." Reeves v. Geigy Pharmaceutical, Inc., 764 P.2d 636, 642 (Utah Ct. App. 1988) (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986)). Furthermore, "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986); accord Robinson v. Intermountain Health Care, Inc., 740 P.2d 262, 264 (Utah Ct. App. 1987).

B. Myers Cannot Maintain an Action on the Contract and Quasi-Contract Claims by Reason of the Real Estate Licensing Laws

The district court held that Myers' contract and quasi-contract claims were barred by the broker licensing statutes.[17] (R. 370-72.) There were no issues of material

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[17] Myers states that the basis for the district court's decision was not clearly articulated. (Brief of Appellants at 20.) There can be no question that the district court found that both the broker licensing statutes and the Statute of Frauds precluded Myers' contract and quasi-contract claims. The Order Granting Partial Summary Judgment, (R. 370-72), granted judgment on the second and third causes of action of the

fact and the ruling of the district court was correct as a matter of law.[18]

An unlicensed person may not bring or maintain an action in Utah for the recovery of compensation for services performed which are only authorized to be performed by a licensed real estate broker. The pertinent statutory provisions are contained in title 61, chapter 2, of the Utah Code. Section 61-2-18(1) provides:

> No person may bring or maintain an action in any court of this state for the recovery of a commission, fee, or compensation for any act done or service rendered which is prohibited under this chapter to other than licensed principal brokers, unless the person was duly licensed as a principal broker at the time of the doing of the act or rendering the service.

Utah Code Ann. § 61-2-18(1) (1989). Section 61-2-2(7)(a) defines "principal broker" as follows:

Complaint which sought a declaratory judgment that Myers' claims against Andalex were barred by the Statute of Frauds and the broker licensing statutes. The Order also granted summary judgment on the first and second causes of action of the counterclaim, which were Myers' contract and quasi-contract claims against Andalex. Regardless, the Court may affirm on any basis supported by the record. See supra note 5.

[18] Myers states that Andalex conceded Myers' version of the facts in connection with the motion because Andalex failed to respond in its reply memorandum to Myers' factual contentions. (Brief of Appellants at 20.) This statement is not correct. In fact, in its reply memorandum, Andalex addressed many of Myers' factual assertions, and demonstrated that those assertions were insufficient to deny the motion for summary judgment. (E.g., R. 354, 358-60.) The remainder of Myers' factual assertions were deemed sufficiently immaterial to merit a specific response.

> [A]ny person who for another and for valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting valuable consideration, sells, exchanges, purchases, rents or leases, . . . or assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is calculated to result in the sale, exchange, leasing or renting of any real estate. . . .

Utah Code Ann. § 61-2-2(7)(a) (1989) (emphasis added).[19] Section 61-2-2(8) defines "real estate" to include leaseholds and business opportunities involving real property. Utah Code Ann. § 61-2-2(8) (1989).[20] See also Chase v. Morgan, 9 Utah 2d 125, 339 P. 2d 1019, 1021 (1959) (holding that an oil and gas lease was real estate for purposes of the broker licensing provisions).

The services allegedly provided by Myers fall within the provisions of section 61-2-2(7). In Diversified General Corp. v. White Barn Golf Course, Inc., 584 P. 2d 848 (Utah 1978), the plaintiff argued he did not need to be a licensed broker to recover a finder's fee because his duties under the contract were merely to find or locate a prospective buyer, and nothing more. Id. at 849-50. The Utah Supreme Court rejected plaintiff's argument and held that the plaintiff's actions fell

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[19]Section 61-2-2 was amended in 1991. The substance of the definition of "principal broker" remains the same. See Utah Code Ann. § 61-2-2(9)(d) (Supp. 1992).

[20]Section 61-2-2 was amended in 1991 and the definition of real estate is now found in section 61-2-2(10). See Utah Code Ann. § 61-2-2(10) (Supp. 1992).

within the statutory definition of a broker. In reaching its decision, the Court cited with approval Corson v. Keane, 72 A. 2d 314 (N. J. 1950). In Corson, the plaintiff argued that he need not be licensed because his duties were merely to bring the buyer and seller together. The Corson court dismissed the argument, noting:

> If the statute does not apply to such a situation, then it is a toothless enactment . . . . In short, every unlicensed broker will be enabled to carry on his business just as he did before the statute came into existence, simply by calling himself a finder, an originator, an introducer, instead of a broker.

Corson, 72 A. 2d at 316 (citing Baird v. Krancer, 246 N. Y. S. 85, 88 (N. Y. Sup. Ct. 1930); Diversified Gen., 584 P. 2d at 851 (quoting Corson).[21]

Myers argues that he was not a "principal broker," as defined by section 61-2-2(7), because the services he provided were not of a nature contemplated by the "purpose" of the licensing requirements for principal brokers.[22] To accept Myers' argument requires the Court to ignore the clear and

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[21] Recovery by a plaintiff on a claim that is barred by reason of section 61-2-18, of the Utah Code, is not permitted based on a theory of quantum meruit. Baugh v. Darley, 112 Utah 1, 184 P. 2d 335, 339 (1947); accord, Watts v. Andrews, 649 P. 2d 472, 474 (N. M. 1982).

[22] Myers contends that the purpose of the licensing provisions is to protect the public from unscrupulous real estate brokers and to insure honesty and integrity. Incredibly, Myers seems to suggest that the services he provided did not require honesty and integrity and therefore the services do not fall within the purpose of the statute.

unambiguous terms of sections 61-2-18(1) and 61-2-2(7). Myers argues that the purpose of the statute prevail over literal, technical interpretations. He fails to recognize, however, that the best evidence of a statute's purpose is the language of the statute. E.g., Janson ex rel. Janson v. Christensen, 808 P.2d 1222, 1223 (Ariz. 1991). Because the language is the best evidence of meaning, courts will only consider matters extrinsic to the language of a statute when there is some ambiguity or uncertainty as to the statute's meaning or application. This issue was directly addressed by this Court in Cox Rock Products v. Walker Pipeline Construction, 754 P.2d 672 (Utah Ct. App. 1988). The Court stated:

> [T]here exists no ambiguous language or inconsistency which the court must interpret or construe to explain its exact meaning. 'We will interpret and apply [a] statute according to its literal wording unless it is unreasonably confused or inoperable.' Gleave v. Denver & Rio Grande Western R.R. Co., 749 P.2d 660, 672 (Utah Ct. App. 1988).
>
> Since the language is clear, and only one meaning can be derived from an express exclusion, it is not appropriate to look to legislative history. 'There is nothing to construe where there is no ambiguity in the statute.' State v. Archuletta, 526 P.2d 911, 912 (Utah 1974). See Mountain States Tel. & Tel. Co. v. Public Serv. Comm'n, 107 Utah 502, 505, 155 P.2d 184, 185 (Utah 1945) (statutory interpretation 'must be based on the language used, . . . and the court has no power to rewrite a statute to make it conform to an intention not expressed').

754 P. 2d at 676. See also Intermountain Smelting Corp. v. Capitano, 610 P. 2d 334, 337 (Utah 1980); Cannon v. Gardner, 611 P. 2d 1207, 1208-09 (Utah 1980).

In any event, the services provided by Myers do fall within the purpose of the licensing statutes. Those statutes clearly apply to "finders." Diversified Gen., 584 P. 2d at 851. Since the legislature intended the licensing requirements to apply to "finders," then the legislature must have intended the purpose of the statute (i.e., protection of the public) to apply to finders and parties dealing with finders. Thus, even though Myers may have only been acting as a "finder," the purpose of the statute still applies. Furthermore, contrary to Myers' contention,[23] corporate plaintiffs, including Andalex, are entitled to the protection of the statute, regardless of their sophistication.

Myers seems to argue that because his compensation for acting as a finder was a partnership interest with Andalex, he was not acting as a broker. This argument ignores the express language of the statute. The term "principal broker" is not defined by the method of compensation, but, rather, by consideration of the acts performed and whether the broker had an "expectation" of receiving "valuable consideration." See Utah Code Ann. § 61-2-2(7)(a) (1989).

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[23]See Brief of Appellants at 21.

In this case, Myers was to receive "valuable consideration," i.e., the alleged partnership interest, as compensation for bringing the parties together.[24] Clearly, Myers was acting as a "principal broker" within the meaning of Utah's broker licensing statute, and he was required to be licensed.[25] Because he was not, the trial court properly dismissed Myers' contract and quasi-contract claims.

C. The Contract and Quasi-Contract Claims of Myers Against Andalex are Barred by the Statute of Frauds

The district court also found that Myers' contract and quasi-contract claims were barred by the Statute of Frauds.[26]

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[24] See supra note 10 (describing the purpose of the Grace/Myers agreement which Andalex allegedly assumed).

[25] The Court should also note that Myers has provided no support for his contention that indeed there was an agreement between Myers and Andalex. Myers makes this factual conclusion in Brief of Appellants at 9, ¶ 17. To support the contention, Myers cites pages 213-14 of the Record, at which Andalex's Memorandum in support of its Motion for Summary Judgment is found. Presumably, Myers is citing to paragraph 11 of Andalex's Statement of Facts, which recites Myers' contention based upon his allegations contained in his counterclaim. It does not support the "facts" asserted by Myers in his Brief. Furthermore, a citation to one's own pleading to support a factual contention in opposition to a motion for summary judgment, which is what in effect Myers has done, is inappropriate and the contention should be disregarded. Hall v. Fitzgerald, 671 P.2d 224, 226-27 (Utah 1983); Thornock v. Cook, 604 P.2d 934, 936 (Utah 1979); United Am. Life Ins. Co. v. Willey, 21 Utah 2d 279, 444 P.2d 755, 758-59 (1968).

[26] Myers claims that the district court did not state its grounds for granting summary judgment. (Brief of Appellants at 22) As noted earlier, there is no question that the district court found that both the Statute of Frauds and the broker licensing statutes precluded Myers' contract and quasi-contract

(R. 370-72.) There were no issues of material fact and the ruling of the district court was correct as a matter of law.[27]

Under the Utah Statute of Frauds, Utah Code Ann. § 25-5-4(5) (1989),[28] every agreement authorizing or employing an agent or broker to purchase or sell real estate[29] for

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claims. See supra note 17. In any event, this Court may affirm on any basis supported by the record. See supra note 5.

[27] Myers has not made a proper citation to the record to support his contention that there was any agreement between him and Andalex. See supra note 25.

[28] Section 25-5-4 provides:

> In the following cases, every agreement shall be void unless such agreement, or some note or memorandum of the agreement, is in writing subscribed by the party to be charged with the agreement:
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> . . . .
>
> (5) Every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation.

Utah Code Ann. § 25-5-4 (1989). The relevant portion of the current version of section 25-5-4 remains substantially the same. See Utah Code Ann. § 25-5-4 (Supp. 1992).

[29] The subject Leases are "real estate" for purposes of the Statute of Frauds. The term "real estate" is not defined in section 25-5-4. However, the term is defined in Utah Code Ann. § 68-3-12 (1986) which sets forth various definitions to be used in construing the statutes of the State of Utah. Section 68-3-12(10) defines "real estate" to "include land, tenements, hereditaments, water rights, possessory rights, and claims." See also Utah Code Ann. § 68-3-12(2)(h) (Supp. 1992) (current version of former § 68-3-12(10)). See also Utah Code Ann. § 57-1-1(3) (Supp. 1992); Chase v. Morgan, 9 Utah 2d 125, 339 P. 2d 1019, 1021 (1959) (holding that an oil and gas lease was real estate under the broker licensing statute).

compensation must be in a writing signed by the party to be charged with the agreement. The Statute of Frauds "applies broadly to agreements requiring compensation for brokering real estate, including finder's agreements, and not just to contracts employing brokers to purchase or sell real estate for compensation." Machan Hampshire Properties, Inc. v. Western Real Estate & Dev. Co., 779 P. 2d 230, 234 (Utah Ct. App. 1989). See also C.J. Realty, Inc. v. Willey, 758 P. 2d 923, 927 (Utah Ct. App. 1988).

Furthermore, the Statute of Frauds applies to agreements for compensation when the agent's or broker's duties are merely to introduce or provide names of prospective purchasers, as Myers claims his duties were in this case. In C.J. Realty, Inc. v. Willey, 758 P. 2d 923 (Utah Ct. App. 1988) the plaintiff argued that its contract was merely an agreement for a "finder's fee," and that his duties were only to furnish a list of prospective purchasers. Id. at 925 & n. 1. The plaintiff claimed that because of the limited nature of his duties, the statutes governing real estate brokers, including the Statute of Frauds, were inapplicable. The Court specifically held that the Statute of Frauds was applicable to the plaintiff's agreement. Id. at 927; see also Diversified Gen., 584 P. 2d at 234 (Statute of Frauds applies to finder's agreement); Machan Hampshire, 779 P. 2d at 234.

According to Myers, he was to act as a "finder" on behalf of MPM and was to be compensated for his alleged services in connection with Andalex's purchase of the Leases. (R. 539-40.) This is clearly an agreement subject to the Statute of Frauds. Since there is no written document signed by Andalex which evinces the alleged agreement, such agreement, if one existed at all, is void and unenforceable.[30]

III. MYERS' CLAIM OF FRAUD AGAINST ANDALEX WAS PROPERLY DISMISSED BECAUSE OF A LACK OF EVIDENTIARY SUPPORT

Myers appeals the district court's order dismissing his counterclaim[31] alleging that Andalex fraudulently represented that it would compensate him in accordance with the

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[30] Myers' claim of quantum meruit is likewise barred. A claim based on an oral contract barred by Section 25-5-4(5), cannot be used as a basis for recovery on a theory of quantum meruit. Baugh v. Darley, 112 Utah 1, 184 P.2d 335, 339-340 (1947); see also, C.C. Marvel, Annotation, Real-estate Broker's Right to Recover in Quantum Meruit for Services Although Contract is Not in Writing as Required by Statute, 41 A.L.R.2d 905, 906 (1955).

[31] The district court also dismissed Myers' claim that Andalex misrepresented that it intended to enter into a joint venture agreement with Grace for the purpose of producing coal from the leases. (R. 133.) No discussion of this issue appears in Myers' Brief; we therefore assume Myers has also conceded this point.

terms of his agreement with Grace.[32] The elements of an action for fraudulent misrepresentation are:

> (1) a representation; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage.

Dugan v. Jones, 615 P. 2d 1239, 1246 (Utah 1980). See also Crookston v. Fire Ins. Exch., 817 P. 2d 789, 800 (Utah 1991).

In resisting this motion for summary judgment, Myers, who has the burden of proof on this fraud claim, must come forth with proof in order to avoid summary judgment. Reeves v. Geigy Pharmaceutical, Inc., 764 P. 2d 636, 642 (Utah Ct. App. 1988) (citing Celotex Corp. v. Catrett, 477 U. S. 317 (1986)). Myers must prove each element of his fraud claim, including intentional misrepresentation, with clear and convincing evidence. See Crookston, 817 P. 2d at 800; Territorial Sav. & Loan Ass'n v. Baird, 781 P. 2d 452, 462 (Utah Ct. App. 1989); see

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[32] Myers has not cited to this Court or the district court to any admissible evidence, as required by Rule 56(c) of the Utah Rule of Civil Procedure, supporting his claim of misrepresentation. Rather, Myers relies on his own contentions. Because Myers' contentions are without support in the record or in fact, they should be disregarded by this Court. E.g., Hall v. Fitzgerald, 671 P. 2d 224, 226-27 (Utah 1983); Thornock v. Cook, 604 P. 2d 934, 936 (Utah 1979); United Am. Life Ins. Co. v. Willey, 21 Utah 2d 279, 444 P. 2d 755, 758-59 (1968).

also Robinson v. Intermountain Health Care, Inc., 740 P.2d 262, 264 (Utah Ct. App. 1987) (when ruling on a motion for summary judgment, the court must consider the standard of proof); Moffat Enters., Inc. v. Borden, Inc., 807 F.2d 1169, 1178 (3d Cir. 1987) (fraud and negligent misrepresentation claims summarily dismissed because claimant could not demonstrate he could satisfy burden of proof).

Andalex's alleged misrepresentation concerns intended future acts by Andalex, specifically, an intent to compensate Myers in the future. A misrepresentation of intended future performance is not a "presently existing fact" upon which a claim for fraud can be based unless the plaintiff can prove that the representor, at the time of the representation, did not intend to perform the promise and made the representation for the purpose of deceiving the promisee. Cerritos Trucking Co. v. Utah Venture No. 1, 645 P.2d 608, 611 (Utah 1982); Berkeley Bank For Coops. v. Meibos, 607 P.2d 798, 805 (Utah 1980).

The only evidence offered by Myers to support the element of intent is that Mr. Anderson, the Chief Executive Officer of Andalex, never disclosed the promise to Keith Smith, a subordinate of Mr. Anderson's who was also working on the project. Mr. Anderson's failure to tell Mr. Smith of his "promise" to compensate Myers is easily explained. Mr. Anderson never made such a promise and therefore had nothing to share with Mr. Smith. Even if such a promise were made, this alleged

"failure" does not support a claim that Mr. Anderson had formed an intent in his mind to commit an intentional fraud.

For a representation to be actionable, it must have been made "wilfully and knowingly." Marks v. Continental Casualty Co., 19 Utah 2d 119, 427 P.2d 387, 389 (1967). Mr. Anderson's failure to communicate an alleged promise to his subordinate is simply not evidence of a wilful and knowing falsehood. This is particularly evident when viewed in the context of Mr. Myers' own testimony. Mr. Myers testified that he believed that Andalex was honest in its dealings with Myers and was not attempting to deceive Myers.[33] (R. 876-78.)

Myers presented to the district court no evidence of fraudulent intent to support his claim for fraud. Because Myers

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[33]As noted, the only basis articulated by Myers to support his claim of fraud is the failure of Anderson to communicate the alleged promise to his subordinate. Myers does not urge nonperformance or nondisclosure in support of his claim. Nor could he. The mere nonperformance of an alleged agreement will not support a claim of fraud because nonperformance does not prove that the representor did not intend to perform at the time of the representation. Murray v. Xerox Corp., 811 F.2d 118, 122 (2d Cir. 1987); Benetton Servs. Corp. v. Benedot, Inc., 551 So. 2d 295, 298 (Ala. 1989); State Bank of Willey v. States, 723 P.2d 159, 160 (Colo. Ct. App. 1986). See Cerritos Trucking, 645 P.2d at 612. Nondisclosure can properly form the basis of a fraud claim only where there exists "a duty to speak." Sugarhouse Fin. Co. v. Anderson, 610 P.2d 1369, 1373 (Utah 1980). As a matter of law, Andalex had no "duty to speak" in this arm's length business transaction. Id. at 1373. See also Hull v. Flinders, 83 Utah 158, 27 P.2d 56, 58 (1933) ("[I]f promise is made in good faith when contract is entered into there is no fraud though the promisor subsequently changes his mind and fails or refuses to perform.").

was unable to satisfy his burden of "clear and convincing" proof, the motion for summary judgment was properly granted.

IV. THE CONTRACT CLAIMS AGAINST MPM WERE PROPERLY DISMISSED

The contract claims against MPM were properly dismissed on two separate grounds. First, the broker licensing statutes bar the claims. Second, MPM did not have an obligation, expressed or implied, to assure that Andalex compensated Myers.

A. The Broker Licensing Statutes Require Myers' Contract Claims Against MPM Be Dismissed

The essence of Myers' contract claim against MPM is that they were to assure that any sublessee, assignee or purchaser of the Leases, in this instance Andalex, would compensate Myers for his alleged services of acting as a "finder" in connection with the transaction. In other words, this is an action by Myers to recover compensation for acting as a "broker."

As previously discussed, no unlicensed person may bring or maintain an action in Utah for the recovery of compensation for services performed which are only authorized to be performed by a licensed broker. Supra pp. 26-32; Utah Code Ann. § 61-2-18(1) (1985). Furthermore, a "finder," which is how Myers characterizes his involvement, falls within the parameters of the definition of "broker" contained in section 61-2-2(7). Utah Code Ann. § 61-2-2(7) (1989); Diversified Gen. Corp. v.

White Barn Golf Course, Inc., 584 P. 2d 848, 849-50 (Utah 1978) (a party who brings buyer and seller together is "broker" for purposes of statute); see supra pp. 28-31. There is also no question that Myers is not licensed as a broker. (R. 595.) Because Myers was acting as a broker but is not licensed as one, he is precluded from bringing or maintaining an action to recover compensation for his service. Myers argues that the broker licensing laws are inapplicable to his claim against MPM because his claim is not an action to recover compensation for acting as a broker, but rather an action to recover damages for the failure of MPM to assure that Andalex agreed to compensate Myers. The distinction that Myers attempts to make is a distinction without a difference. Myers' claim against MPM is still an action to recover compensation for bringing MPM and Andalex together. Instead of seeking recovery directly from Andalex, the party which Myers claims contractually owes him the compensation, Myers is simply attempting to recover the same compensation in the form of damages from MPM. The pertinent statutory authority makes no distinction between direct compensation and damages. The statute simply provides that an unlicensed broker cannot maintain an action to recover a fee or compensation for acting as a broker, regardless of the party pursued. [34]

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[34] In Realty Executives, Inc. v. Northrup, King & Co., 539 P. 2d 514, 517 (Ariz. Ct. App. 1975), the court noted that an unlicensed broker could not recover damages where his action

Moreover, Myers admits that if his claim against MPM were based upon a theory of suretyship or guaranty, he may be precluded from maintaining the action. (Brief of Appellants at 27.) A surety relationship is defined generally in 72 C.J.S. Principal and Surety § 2 (1987) as follows: "The relationship of principal and surety, or suretyship, in its broadest sense, is the relationship occupied by a person liable ... for the performance of an act by another...." A guaranty is defined in 38 C.J.S. Guaranty § 1 (1943) as follows: "A guaranty is a collateral undertaking by one person to answer for ... the performance of some ... duty in case of the default of another person...." Myers' claim against MPM is in fact based upon a theory of suretyship or guaranty. Myers' contention is that MPM agreed to assure or insist that Andalex would compensate him for his services. (Brief of Appellants at 26.) The alleged agreement between MPM and Myers, as described by Myers, falls within the definitions of surety or guaranty.[35] As noted by Myers, it therefore should be dismissed.

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could not be established without a showing that he violated the law. Likewise, Myers cannot establish his claim against MPM without showing he violated the law by performing services without a proper license.

[35] Myers' claim is basically that MPM was assuring Andalex's performance, similar to a performance bonds. A performance bond creates a suretyship. Cf. Board of County Supervisors v. Sie-Gray Developers, Inc., 334 S.E.2d 542, 546 (Va. 1985).

Myers' claim is barred as a matter of law under the broker licensing statutes, and summary judgment was properly entered.

B. MPM Had No Implied Contractual Obligation to Assure Myers' Compensation

Myers' contends[36] that his agreement with MPM contained a covenant of good faith and fair dealing which required MPM to assure that Andalex compensated Myers so that Myers would receive his "expectation."[37] (Brief of Appellant at 28.)

Myers testified that his "expectation" regarding the compensation arrangement between the parties was accurately

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[36]Before the district court, Myers also urged that MPM had intentionally interfered with economic relations. This claim has been dropped on appeal. (Brief of Appellants at 26 n. 65.)

[37] The claim against MPM is based in part on the factual assertion that MPM had insisted that Grace compensate Myers. (Brief of Appellants at 8, ¶ 12; 9, ¶ 18; 26.) In Myers' Brief, he contends that as a result of such insistence, Grace entered into an agreement with Myers. (Brief of Appellants at 26.) To support this conclusion, Myers cites to his own Memorandum in Opposition to MPM's Motion for Summary Judgment. In the Memorandum, Myers cites to his own answers to interrogatories. A citation to one's own answers to interrogatories does not create an issue of fact to preclude summary judgment, unless the answer meets the evidentiary requirements of Rule 56(e) of the Utah Rules of Civil Procedure. A & M Enters., Inc. v. Hunziker, 25 Utah 2d 363, 482 P.2d 700, 701-02 (1971); Cf. Car Ctr., Inc. v. Home Indem. Co., 519 So. 2d 1319, 1322 (Ala. 1988). The answers to which Myers refers contain mere conclusions and would not be admissible evidence. Therefore, the answers do not comply with Rule 56(e). D & L Supply v. Saurini, 775 P.2d 420, 421 (Utah 1989). Accordingly, the contention should be disregarded. See also supra note 32.

reflected in the letter agreement and subsequent correspondence between the parties. (R. 547-52.) It is undisputed that these documents do not contain an express obligation for MPM to assure Myers' compensation. (R. 540, 545-46, 551-52.) As a matter of law, a court will not imply terms to relieve a party from the express terms of a contract absent mutual assent. Fowler v. Taylor, 554 P. 2d 205, 208 (Utah 1976) (quoting Rasmussen v. United States Steel Co., 1 Utah 2d 291, 265 P. 2d 1002, 1004 (1954)); Rapp v. Salt Lake City, 527 P. 2d 651, 654 (quoting Rasmussen).

The letters which comprise the agreement between these parties do not in anyway suggest or imply that MPM were obligated to require any such purchaser to compensate Myers. In fact, the intent of both parties as manifested by these writings is to the contrary. For example, in the May 23 letter Myers states: "My intent is to receive any compensation for sub-lease of coal from the producer of the coal." (Addendum, Ex. A.) The intent of MPM on this issue was stated in the March 18, 1981 letter as follows:

> Insofar as compensation is concerned, you initially established in your May 23, 1979 letter to our group, that you would seek any compensation for your efforts from the purchaser, and we agreed to allow you to present qualified purchasers on that basis. It is not our desire to depart from that position in any way with respect to your continued activities.

(Addendum, Ex. C) (emphasis added). This issue was also addressed in the March 24, 1981 letter from Mono to Myers, where Mono stated:

> It also follows that we are in agreement that any compensation to which you may be entitled for finding a buyer for Mono Powers' interest must be arranged with such buyer by you and not by us.

(Addendum, Ex. D) (emphasis added). Similarly, in a letter from Pacific to Myers dated May 5, 1980, Pacific stated:

> I would like to reiterate our agreement that any compensation to you for your efforts will have to be worked out between you and interested parties other than [Malapai], Mono Power, and [Pacific].

(Addendum, Ex. B) (emphasis added). Myers testified that these letters accurately reflected his understanding of the agreement. (R. 547-52.)

The correspondence upon which Myers relies for his contract claim is clear and unambiguous on the issue of compensation: The parties intended and agreed that any compensation for Myers was to come from the purchaser and that Myers was obligated to make his own arrangements for compensation. Because there is no evidence of mutual assent to imply a term contrary to these express terms, Myers' claim based on any such implied term was properly dismissed by the district court.

Even assuming there was an "agreement" between the parties which gives rise to an implied covenant of good faith,

such a covenant does not require a party to take affirmative action to protect the interest of the other party to the contract. This issue has been addressed by a series of Utah cases. In Ted R. Brown & Assocs., Inc. v. Carnes Corp., 753 P. 2d 964 (Utah Ct. App. 1988), this Court observed:

> It is fundamental that every contract imposes a duty on the parties to exercise their contractual rights and perform their contractual obligations reasonably and in good faith. Nonetheless, a court may not make a better contract for the parties than they have made for themselves; furthermore, a court may not enforce asserted rights not supported by the contract itself. '[I]t cannot be adopted as a general precept of contract law that, whenever one party to a contract can show injury flowing from the exercise of a contract right by the other, a basis for relief will be somehow devised by the courts.'

Id. at 970 (citations omitted). In Brehany v. Nordstrom, Inc., 812 P. 2d 49 (Utah 1991) the Utah Supreme Court stated with regard to the implied covenant of good faith: "Such a covenant cannot be construed, however, to establish new, independent rights or duties not agreed upon by the parties." Id. at 55. In Rio Algom Corp. v. Jimco Ltd., 618 P. 2d 497 (Utah 1980) the supreme court emphasized that "[a] court will not enforce asserted rights that are not supported by the contract itself." Id. at 505.

None of the cases cited by Myers supports his argument that a contracting party must take affirmative action to protect the other party to comply with the covenant of good faith. In

St. Benedict's Development Co. v. St. Benedict Hospital, 811 P. 2d 194 (Utah 1991), cited by Myers, the defendant was accused of violating the covenant of good faith because it had taken affirmative action in contravention of express terms of the agreement. Id. at 198-200. This case has no application here. Myers' reliance on Steinmeyer v. Warner Consolidated Corp., 116 Cal. Rptr. 57 (Cal. Ct. App. 1974), is also misplaced. In that case, the court stated that each party has a duty "to do everything the contract presupposes." Id. at 60 (quoting Harm v. Frasher, 5 Cal. Rptr. 367, 374 (Cal. Ct. App. 1960)). The court did not express or infer that a party must take affirmative action outside the contract terms to protect the other party.

Myers relies on Steven J. Burton, Breach of Contract and the Common Law Duty to Perform in Good Faith, 94 Harv. L. Rev. 369 (1980), for his argument that in denying Myers his expected compensation, MPM improperly exercised discretion granted under the agreement in a way not contemplated by the parties. This argument is simply erroneous. The contemplation of the parties is set forth in the correspondence between them. Myers does not dispute this. The correspondence, as noted above, states that Myers is to make his own arrangements for compensation. Nowhere is there any suggestion in that correspondence that the parties contemplated that MPM would assure compensation to Myers. Furthermore, the article relied

upon by Myers states that when discretion is exercised for a legitimate purpose, the covenant is not violated. Id. at 384-85 ("The courts, mindful that good faith should not be used as a vehicle for judicial fiat, defer to a party who acts with no improper purpose."). Myers has presented no evidence that suggests that the transaction with Andalex was not a legitimate business transaction, or done in bad faith or for an improper purpose.

If, in fact, an enforceable agreement exists between Myers and MPM, it is set forth in the various letters referenced above. At no point in his Brief does Myers attempt to challenge or refute the clear and unmistakable language of that correspondence. Those letters unambiguously provide that any compensation to Myers was to come from the potential purchaser and such compensation was to be arranged by Myers. There is nothing in the correspondence that even suggests that MPM had a duty to assure Myers' compensation.

Myers' argument that the covenant of good faith required MPM to assure Myers' compensation is taking the covenant to the extreme and absurd. The covenant simply does not require a party to forego its rights and privileges under a contractual arrangement to protect the other party. All that is required is good faith. There is no showing that MPM failed to

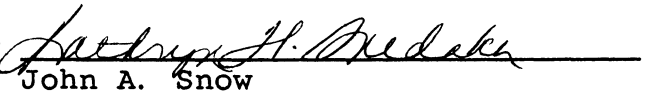
exercise good faith. The district court's order of summary judgment on this issue should be affirmed.

CONCLUSION

Myers has presented no evidence or argument that justifies reversal of the trial court's decisions below. The trial court did not abuse its discretion when it denied Myers' efforts to add, in an action that had been pending for five years, a claim that was itself legally insufficient as a matter of law. Moreover, the trial court properly entered judgment in favor of Andalex and MPM on all claims between the parties. The trial court properly held that Myers' contract claims were barred by the real estate licensing statutes and Statute of Frauds and that his fraud claim failed for lack of proof. The trial court's decision should be affirmed.

DATED this 12th day of January, 1993.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By 

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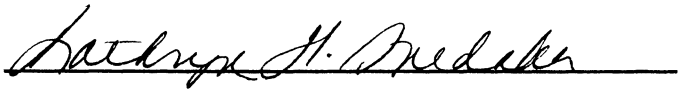
CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the within and foregoing Brief of Appellees to be hand delivered this 12th day of January, 1993, to the following:

Craig G. Adamson
Eric P. Lee
DART, ADAMSON & DONOVAN
310 South Main Street, Suite 1330
Salt Lake City, Utah 84101



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Tab A

RICHARD B. MYERS

P. O. BOX 301

MADISONVILLE, KENTUCKY 42431

May 23, 1979

I, Richard B. Myers, P. O. Box 301, Madisonville, Kentucky 42431 will act as agent for the Resource Company for the sole purpose of leasing or the selling of federal and state leases now owned by Resource Company located in Kaiparowits Plateau, south central Utah.

As previously agreed I will get approval from you before presenting this property and or leases to any mining firm or producer. I will attempt to sub-lease the properties as recommended by Mr. Nugent and would consider sale of leases with your consent only. My intent is to receive any compensation for sub-lease of coal from the producer of the coal. Should a sales agreement be reached with your consent my commission fee would be five percent on the first million and two percent on all over the one million dollars.

Knowing that this will not be a short term project I would appreciate your designating a length of time to be allowed for me to come up with a producer. Should I introduce a producer and it takes a greater time to arrange the deal than alloted me I would still consider myself the finder.

I understand that you have the right to refuse any mining company or producer that is not acceptable to your firm.

ACCEPTED BY:

PROPOSED BY:

Richard B. Myers

PLAINTIFF'S EXHIBIT

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Tab B

NEW ALBION RESOURCES CO.
P. O. BOX 168 - SAN DIEGO, CALIF. 92112

May 5, 1980

Mr. Richard B. Myers
P.O. Box 301
Madisonville, Kentucky 42431

Dear Mr. Myers:

This lettter is in response to your recent activities and your letter of February 13. Speaking for NARCO and our partners, we are very impressed with the collective effort that you and the Koppers Company personnel put into the assessment of our Kaiparowits leases as a source of coal for a Koppers methanol installation. We would be willing to look at other interested parties that you present to us on a case by case basis until such time as we indicate otherwise.

I would like to reiterate our agreement that any compensation to you for your efforts will have to be worked out between you and interested parties other than NARCO, Mono Power, and Resources Co. I look forward to meeting with you and your prospective Kaiparowits coal lease developers.

Very truly yours,

James M. Nugent
General Manager, NARCO

me/

cc: J. L. Wilson

PLAINTIFF'S EXHIBIT

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Tab C

RESOURCES COMPANY
P. O. Box 20824 • Phoenix, Arizona 85036

March 18, 1981

Mr. Richard B. Myers
Myers & Company
P.O. Box 301
Madisonville, KY 42431

Dear Mr. Myers:

This letter is written to you in order to confirm a telephone conference call on Monday, March 16, 1981, between yourself and representatives of Resources Company, New Albion Resources Company and Mono Power Company. The matters discussed in the following paragraphs represent the position of Resources Company only, and do not reflect the relative positions of New Albion or Mono.

A copy of your December 23, 1980 letter to Ron Watkins has been furnished to us. Naturally, we are somewhat disappointed and confused by your reluctance to execute our November 12, 1980 letter to you, because we do believe that it accurately describes the relationship between yourself and the Companies.

Be that as it may, we do believe it is necessary that there be some clear understanding regarding the relationship between you and our company, both individually and as a member of the group with New Albion and Mono, particularly in light of the statement in your December 23, 1980 letter to the effect that you will continue working with W.R. Grace & Company as long as there is a possibility of an agreement being reached with our group.

We have no objection to your continued efforts to accomplish a sale of our Kaiparowits interests to W.R. Grace & Company provided, however, that you recognize that Resources Company has never given to you - and does not now give to you - any exclusive right to represent us. As you have always been aware, we have had various discussions with other qualified purchasers not introduced by you and we intend to continue such further discussions at our option. These in no way will establish any rights in your favor should a sale be concluded with a purchaser who was not introduced to us by you.

PLAINTIFF'S EXHIBIT

Insofar as compensation is concerned, you initially established in your May 23, 1979 letter to our group, that you would seek any compensation for your efforts from the purchaser, and we agreed to allow you to present qualified purchasers on that basis. It is not our desire to depart from that position in any way with respect to your continued activities.

Inasmuch as no sales have yet been concluded between the Companies, or any one of them, and a qualified purchaser presented by you, we do not agree that - as you state in your December 23 letter - your company has fulfilled the expectations of your May 23, 1979 letter. We intend, however, to abide by the terms of your May 23, 1979 letter in any further dealings between us.

We do regret the confusion and delay which has surrounded this matter, but we trust that you will understand our position and conduct your activities in recognition of it.

Please indicate your acceptance of the foregoing by written confirmation at your earliest opportunity.

Very truly yours,

Bernard Gass

Bernard Gass
Vice President

jf

Tab D

Mono Power Company
P O BOX 800
2844 WALNUT GROVE AVENUE
ROSEMEAD CALIFORNIA 91770

R. H. BRIDENBECKER
VICE PRESIDENT

March 24, 1981

Mr. Richard B. Myers
Myers & Company
P. O. Box 301
Madisonville, KY 42431

Dear Mr. Myers:

This letter is in confirmation of the matters discussed in a telephone conference call held March 16, 1981, between you and the undersigned, for Mono Power Company, Mr. Ferguson, for Resources Company, and Mr. Nugent, for New Albion Resources Co., as well as the content of the letter representing the views of Resources Co., which was read to you on the telephone.

While we generally concur in the position stated in the Resources Co. letter, we wanted to emphasize that we have been and are now engaged in an intensive exploration of means to utilize the coal produced at Kaiparowits in various projects, and necessarily must stay flexible in our dealing with any potential buyers. Consequently, no negotiation with any person in which we participated ever contemplated a firm, non-exclusive commitment to any potential buyer or sublessee, and, as you are aware, there were a number of negotiations with others going on at the same time. This must continue to be the case.

It also follows that we are in agreement that any compensation to which you might be entitled for finding a buyer for Mono Power's interest must be arranged with such buyer by you and not by us.

We share the regret of the other participants in the Kaiparowits project that there has been a misunderstanding regarding your representation and the focus of your activities, but we believe that such misunderstanding can be avoided in the future by being sure that the views and objectives of each of the participants are clear to you.

Very truly yours,

Rob Bridenbecker

PLAINTIFF'S EXHIBIT

Ex # 17

bcc: W. H. Seaman
C. B. McCarthy
R. J. Cahall
R. Hulse (APS)